U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32220185

Date: SEP. 05, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, a digital artist, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner met the initial evidence requirements of this classification through evidence of either a major, internationally recognized award or meeting at least three of the evidentiary criteria under 8 C.F.R. § 204.5(h)(3). The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility as an individual of extraordinary ability, a petitioner (or anyone on the petitioner's behalf) must establish that they:

- Have extraordinary ability in the sciences, arts, education, business, or athletics;
- Seek to enter the United States to continue work in their area of extraordinary ability; and that
- Their entry into the United States will prospectively substantially benefit the United States.

Extraordinary ability must be demonstrated by evidence of sustained national or international acclaim as well as extensive documentation that their achievements have been recognized in the field. Section 203(b)(1) of the Act.

The implementing regulation further states that the term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." A petitioner can demonstrate that they meet the initial evidence requirements for this immigrant visa classification through evidence of a one-time achievement (that is, a major, internationally recognized award). If such evidence is unavailable, then they must alternatively provide evidence that meets at least three of the ten listed criteria, which call for evidence about lesser awards they may have received, published material about them in qualifying media, and their authorship of scholarly articles, among other types of evidence. 8 C.F.R. §§ 204.5(h)(2),(3).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination, assessing whether the record shows that the individual possesses the acclaim and recognition required for this highly exclusive immigrant visa classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is a digital artist who produces works in the surrealist photomontage genre. At the time of filing he was employed in the United States as a digital art director pursuant to O-1B nonimmigrant status, and was also involved in digital art workshops and mentoring other artists. He states that he plans to continue these latter activities.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that he received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director determined that the Petitioner met one of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to the display of his work at artistic exhibitions. We agree. On appeal, the Petitioner asserts that he also meets an additional four evidentiary criteria.[1] After reviewing all of the evidence in the record, we conclude that he does not meet at least three of the evidentiary criteria.

> *Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.* 8 C.F.R. § 204.5(h)(3)(i)

To meet this criterion, a petitioner must establish that they have received prizes or awards, which were granted for excellence in their field of endeavor, and that the prizes or awards are nationally or internationally recognized in their field of endeavor.

[1] The Petitioner does not challenge the Director's conclusion that he does not meet the criterion at 8 C.F.R. § 204.5(h)(3)(iv) relating to his participation as a judge of the work of others in his field. An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

The Petitioner initially claimed to meet this criterion based upon his selection as an "Honoree" for the [redacted] Awards in 2019 in the "Social: Art & Culture" category, and his selection as a finalist for the 2023 [redacted] "iCanvas Digital Art Award." In his decision, the Director concluded that the record did not establish that the Petitioner received a prize or award from either competition.

In his appeal brief, the Petitioner does not challenge the Director's decision regarding the [redacted] and refers to previously submitted evidence regarding his selection as a [redacted] honoree. That evidence includes a page from the [redacted] Awards website verifying his selection as an honoree, another page describing the judging process, and an email from the [redacted] Awards informing him that his work has been recognized. The judging process information states that in the first round of judging, five nominees are selected for each award category, from which one winner is selected in the second round. It adds that up to 15% of the remaining entries (20% in the email) can receive "special commendation" as honorees.

The first element of this criterion requires that an individual receive a prize or award. The Petitioner has submitted evidence that his name appears on the [redacted] website as an honoree, but does not indicate (or submit evidence showing) what prize or award he received as a result of this selection. In addition, being selected as a nominee for an award, in this case a [redacted] statuette in the Social: Arts & Culture category, is not equivalent to winning that award. Here, the Petitioner was not selected for the short list of nominees for the award, and thus was not eligible to receive the award. We agree with the Director's conclusion that the Petitioner has not established that he received a [redacted] award.

In addition, even if the Petitioner had established that he received a [redacted] award, we also agree that the Petitioner has not established that his selection as an honoree is nationally or internationally recognized. The Director noted in his decision that while a story about the [redacted] awards appeared in the *New York Times* on [redacted] 2006, the article stated that the [redacted] title was "self-proclaimed," which did not support a showing a national or international recognition. On appeal, the Petitioner asserts that the Director placed undue emphasis on this phrase, and restates his response to the Director's request for evidence (RFE), in which he stressed the importance of the *New York Times* reporting on the [redacted] awards in showing their recognition. But we note that the article also referred to the awarding organization as "the grandly titled [redacted] and focused on the "quirky" nature of the proceedings. While we recognize the stature and reach of the *New York Times*, the content and tone of the article does not convey recognition of a prestigious award.

Other evidence in the record regarding the recognition of [redacted] awards was posted by the Public Broadcasting System and the [redacted] Public Policy Center on their own websites. The articles promote their own programs and websites which were nominated for [redacted] and encourage readers to cast votes for their nominees in the [redacted] People's Voice Awards categories. While both the latter article and another very brief article published in the *Los Angeles Times* mention the [redacted] moniker, this phrase carries reduced weight in the context of self-promotional materials. More importantly, this evidence does little to show that the [redacted] awards are recognized in the Petitioner's field of digital art, as neither of the organizations promoting their nominations are involved in that field. Further, there is scant mention of the Petitioner's selection as a [redacted] honoree in the remainder of the record, including interviews of him published after 2019, indicating that neither the Petitioner nor the interviewers considered his selection as a [redacted] honoree worthy of emphasis.

For all of the reasons discussed above, we agree that the Petitioner has not established that he meets this criterion.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii)

To meet this criterion, a petitioner must submit evidence of published material that is about them and relates to their work in their field of endeavor. The material must include the title, date, and author information, and must be published in a professional or major trade publication or other major medium. Also, in compliance with the regulation at 8 C.F.R. § 103.2(b)(3), materials in a foreign language must be accompanied by a certified English translation. When determining whether material was published in one of the qualifying types of media under this criterion, relevant factors include the intended audience and the relative circulation, readership, or viewership of the publication. *See generally* 6 *USCIS Policy Manual* F.2(B)(1), www.uscis.gov/policy-manual.

The Petitioner submitted several articles which are about him and his work as a digital artist. These articles were published on websites including [redacted] petapixel.com, thisiscolossal.com, boredpanda.com, mymodernmet.com, forbes.com, worldjournal.com and others, including several which appear to be what is described in the record as "inspiration blogs." Regarding the articles published on the latter two websites, these were published after the date the Petitioner filed his petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). Accordingly, we will not consider these two articles.

In his decision, the Director reviewed the evidence from similarweb.com regarding visitation statistics for the websites where the articles were published, and concluded that this information did not establish that the websites qualified as professional or major trade publications or other major media. Specifically, he stated that visitation statistics differed from viewership of a website, and thus that the evidence from similarweb.com was "not useful" in determining whether a publication is a professional, major trade, or other major medium. On appeal, the Petitioner cites to a description of page visits of websites and asserts that the statistics presented do not include involuntary visits to a website as suggested by the Director.

USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). Here, the Director's dismissal of the evidence presented was not based on the plain language of the statute, regulations, or relevant USCIS policy, which acknowledges that professional or major online publications are a form of media which may qualify under this criterion. The evidence shows that [redacted] ranks relatively high in global and country visitation, and thus qualifies as a major medium. On the other hand, while boredpanda.com has similarly high visitation rankings, particularly in the category "Other Arts & Entertainment" in the United States, this website is referred to as an inspiration blog in one of the reference letters in the record, and advertises that "Anyone can

write on Bored Panda." As the evidence does not provide statistics for the particular blog page in which the material about the Petitioner and his work was published, the Petitioner has not established that this material was published in one of the qualifying media types.

Accordingly, we disagree with and withdraw the Director's determination regarding this criterion, and conclude that the Petitioner has established that he meets its requirements.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v)

To meet the requirements of this criterion, a petitioner must establish that not only have they made original contributions, but that they have been of major significance in the field. For example, a petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance. *See Visinscaia*, 4 F. Supp. 3d at 134-35.

The Petitioner asserts on appeal that the Director erred in his decision by not considering the content of several reference letters submitted, as well as the work he created for several well-known organizations. Those letters include two which focus on what the Petitioner considers to be his most significant contribution: the selection of his art as the splash screen for [redacted] for 2021.[2] R-D-, a product manager for [redacted] states that the Petitioner was part of the company's [redacted] team of artists who helped the company design [redacted] for use on the [redacted] and that the unveiling of his splash screen art took place at the company's annual conference. R-D- notes that eight million people use [redacted] every month, and that the Petitioner's work was featured in marketing the product. This letter verifies that the Petitioner's [redacted] gained broad exposure through its featured use in the [redacted] application and marketing, but does not establish that it widely impacted or influenced other artists who were exposed to it in using the application.

R-W- , an author of two books featuring the work of artists using [redacted] notes that the Petitioner was featured in his second book. He also calls the splash screen selection [redacted] and states that through it many other artists were inspired and influenced by the Petitioner's work. While we recognize the writer's expertise and skills in using and teaching [redacted] his statement regarding the prestige of the splash screen selection is not otherwise supported in the record. Also, as with the letter above, he does not show that by being exposed to the Petitioner's work, other digital artists were influenced by it in producing their own artworks.

E-J-, a fellow digital artist working in photomontage surrealism, lauds the Petitioner's skill and unique style, noting that the scaling of animals is a hallmark of his work. He also comments on the [redacted] splash screen, stating that the selection of the Petitioner's work place him as a "top of the line artist using this software." In addition, E-J- notes the Petitioner's social media following and the displays of his work in inspiration blogs. As previously discussed, the record includes evidence of the Petitioner's work in several of these inspiration blogs and thus supports the writer's statements in that

[2] We have reviewed and considered all of the letters in the record, including those not specifically mentioned in this decision.

regard. But the writer does not describe a specific original contribution made by the Petitioner that has impacted the field of digital art to the extent that it is of major significance.

In addition to the reference letters, the Petitioner asserts on appeal that the use of his work in connection with the Grammy Awards and the United Nations, as well as large, multinational corporations, shows that it has been "widely implemented." But the evidence shows that the Petitioner's work was used as part of a marketing campaign by the [redacted] change in connection with its partnership with the Grammy Awards, not that it was displayed as a part of the Grammy Awards as the Petitioner suggests. Similarly, while the Petitioner's work was displayed, together with that of many other artists, at the [redacted] Exhibition in conjunction with a United Nations conference in [redacted] Portugal, the evidence does not show that it was "implemented" by the United Nations as the Petitioner asserts.

The evidence shows that the Petitioner's work has been incorporated into marketing campaigns by well-known companies such as [redacted] and has gained exposure through the [redacted] application and inspiration blogs. In addition, the letters demonstrate that other artists respect his style and use of technology in creating his work. However, the record does not establish that the Petitioner has made an original contribution of major significance to the filed of digital art.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii)

To meet the requirements of this criterion, a petitioner must first establish that they have served in a role that was either leading or critical for an organization or establishment, or a department of division thereof, and that the organization, establishment, department, or division has a distinguished reputation. Evidence of a leading role may include a title and matching duties, and should indicate that the petitioner is or was a leader. Evidence supporting a critical role should show that the petitioner has contributed in a way that is of significant importance to the outcome of the organization's or establishment's activities, or those of a division or department. Second, a petitioner must show that the organization or establishment, or department or division thereof, for which the leading or critical role was performed has a distinguished reputation. Factors may include the size, longevity, media coverage, awards, and industry rankings of the organization, establishment, department, or division. *See generally* 6 *USCIS Policy Manual* F.2(b)(1).

The Petitioner asserts on appeal that the Director erred in relying in part upon his statement that he was transitioning out of his role for his employer at the time of filing, noting that the plain language of this criterion allows for consideration of current and previous roles. We agree that past roles are considered under this criterion, but note that the Director did not rest his conclusion on this factor alone. He also considered the letter from the Chief Executive Officer (CEO) of his employer, originally submitted in support of a nonimmigrant visa petition filed for the Petitioner, in which the CEO describes the Petitioner's duties as digital art director. Although the title of "director" implies leadership duties, and the CEO indicates that the Petitioner supervises design staff, the letter does not indicate that the Petitioner leads a specific department or division of the company. It also does not provide sufficient context to show that the Petitioner's role was leading for the overall company.

As for whether the Petitioner's position was critical for his employer, the CEO writes that the Petitioner's expertise in digital art "cements the agency's name in the market but also serves as a beacon, attracting new clientele," and goes on to note that the Petitioner "created successful campaigns with our biggest clients," and that he "develops our business and brings high-profile clients." While attracting clients is important for any business, the letter lacks sufficient detail to demonstrate that the nature and amount of business brought in by the Petitioner, and any resulting revenue or reputation, has been of significant importance to his employer's operations.

In addition, even if the Petitioner had established the first element of this criterion, he has not shown that his employer enjoyed a distinguished reputation. The record includes a photograph of a trophy for the 2019-2020 [redacted] Awards received by the Petitioner's employer, but no further information regarding the award. Despite the Petitioner's emphasis on the company's receipt of an [redacted] the record does not show that this award conveys the same recognition and reputation as the more commonly known [redacted] award granted on a national and international basis.

On appeal, the Petitioner submits copies of the company's webpage which shows the logos of clients for which it has completed projects, asserting that this list of "major multinational clients" demonstrates its distinguished reputation. This list differs slightly from that previously provided in the CEO's letter, but carries the same evidentiary weight. We acknowledge that the Petitioner has submitted evidence that matches two of the factors considered when determining an organization's reputation, but as with the evidence concerning the award discussed above, this documentation lacks sufficient depth concerning the nature and longevity of the company's relationship with these clients to demonstrate that it has a distinguished reputation.

Based on the above, we conclude that the Petitioner has not established that he meets this criterion.

B. Previous Approvals for O-1B Nonimmigrant Status

We note that the record reflects that the Petitioner received O-1B status, a classification reserved for nonimmigrants of extraordinary ability in the arts. Although USCIS has approved at least two O-1B nonimmigrant visa petitions filed on behalf of the Petitioner, the prior approvals do not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different standard - statute, regulations, and case law. The nonimmigrant and immigrant categories have different criteria, definitions and standards for persons working in the arts. "Extraordinary ability in the field of arts" in the nonimmigrant O-1B category means distinction. 8 C.F.R. § 214.2(o)(3)(ii). However, in the immigrant context, "extraordinary ability" reflects that the individual is among the small percentage at the very top of the field. Moreover, each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions.

C. Coming to the United States to Work in Area of Expertise

While no offer of employment or labor certification is required for this classification, a petitioner must submit clear evidence that they are coming to the United States to continue working in their area of expertise. This evidence may include letters from employers, evidence of prearranged commitments, or a statement from the petitioner detailing their plans. 8 C.F.R. § 204.5(h)(5).

In his decision, the Director concluded that the Petitioner's statement was not sufficiently detailed regarding his plans for working in the Untied States, and that he had not submitted sufficient evidence of prearranged commitments. On appeal, the Petitioner highlights letters and emails showing interest from several organizations in continuing to work with the Petitioner. We agree that this evidence, together with his statement, is sufficient to show how the Petitioner will continue to work as a digital artist in the United States, and withdraw the Director's conclusion to the contrary.

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, we have reviewed the entire record and conclude that it does not establish that the Petitioner has the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for those progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of their work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and that they are one of the small percentage who have risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

ORDER: The appeal is dismissed.